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Supreme Court of the United States

October Term, 1941.

No. [redacted] **116**

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Petition and Brief for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Summary Statement of Matter Involved:

This case is the first to reach this Court involving (1) negotiable "non-delivery" insurances (cf. *Ryan* v. *U. S.*, 19 Wall. [86 U. S.] 514); (2) an omnibus reclamation proceedings order in bankruptcy collaterally pleaded by a "non-delivery" insurer; (3) the right of a Federal Court, under Rules 56, 38 and 39 of the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution, to determine issues of fact and intent on contested motion and cross-motion for summary judg-

ment made in a jury case (cf. *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389).

The action (between corporations having diverse citizenship, f. 11) is against an insurance company for plaintiff's damage by "non-delivery" on May 24, 1939, of 47,480 bags of cocoa beans, for delivery of which, and for indemnity against loss by "non-delivery" of which, respectively, plaintiff held as endorsee-pledgee-transferee for value ten negotiable or "order" warehouse receipts of Harbor Stores Corporation, incontestible under New York law, and the sixteen negotiable or "order" insurance contracts sued on, by which, in addition to underwriting other perils and risks, defendant agreed by specially added clauses "also to insure", effective on their respective dates, the risk of "damage by * * * non-delivery" of 47,480 bags of cocoa beans, identically described in the two sets of documents.

The making and issuance of both sets of instruments, the warehouse receipts and the insurance contracts, had been procured by a third party corporation, Garcia Sugars Corporation, in negotiable or "order" form, and endorsed to plaintiff for value. The certificates were so obtained for the purpose, disclosed by the Garcia Company to defendant, of being endorsed over and pledged to plaintiff, as a *bona fide* holder for value, as collateral security and indemnity to plaintiff (cf. *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, CCA 9, 59 F. [2d] 493, 495), for loans to and contracts assumed for Garcia Sugars Corporation by plaintiff (viz., for loans totaling $216,200 and contracts by which plaintiff was bound under the rules of the New York Cocoa Exchange to members thereof for delivery in September of 47,480 bags of cocoa beans); and pursuant to defendant's own purpose to induce plaintiff to forego obtaining from other insurers contracts insuring these broad risks and

conditions, which would cause Garcia's brokers and defendant to "both lose the business" (ff. 378-379).

The Seventh Defense (f. 262) was withdrawn on argument in the District Court; and the only theories of defense involve no dispute of plaintiff's *bona fide* status, genuine non-delivery risk and non-delivery loss, but the contention that defendant intended only to insure "goods" and not (as its certificates state, "also to insure" from date) the "risk of non-delivery" alleged by plaintiff (cf. Comp. pars. 45, 46, ff. 66-68 and Amended Answ., pars. 14, 15, ff. 236-239), and defendant's plea of a reclamation proceedings order, which it contends but offered no other proof to show to be *res adjudicata* as to insurable interest in "goods". Defendant does not contend that plaintiff had no insurable interest in the risk of non-delivery (Cf. *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, CCA 9, 59 F. [2d] 493).

Petitioner prays that a Writ of Certiorari issue to review a decision and judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed "on opinion below" an order and judgment of the United States District Court for the Southern District of New York, which granted a motion by defendant made under Rule 56 for summary judgment, and dismissed plaintiff's complaint with costs, and denied a cross-motion by plaintiff under Rule 56 for summary judgment. Petitioner seeks review thereof in both respects, on fundamental and important novel questions strikingly presented by the record.

Statement as to Jurisdiction.

The order and judgment of the Circuit Court of Appeals was entered on the 7th day of March, 1942 (R., p. 188). The said Court had previously filed its opinion of affirmance, February 14, 1942 (R., p. 161); petitioner

thereafter had filed, pursuant to Rule XXVII of said Court, a petition for rehearng February 28, 1942 (R., p. 162), which the Court had denied March 5, 1942. The Court's jurisdiction to entertain and grant this petition is provided by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A., Section 347 (a) (*Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498; *U. S.* v. *Seminole Nation,* 299 U. S. 417, 420-421; *Bowman* v. *Loperena,* 311 U. S. 262, 266).

Decision Below.

The only affidavits defendant filed were those "in support of said motion for defendant" (f. 453); it filed no subsequent affidavits opposing plaintiff's cross-motion nor denying the different facts shown in plaintiff's affidavits, and appears to concede that if under the facts shown in plaintiff's undenied papers the insurances are interpretable as special agreements "also to insure" from date the plaintiff's "risk of non-delivery", as alleged by plaintiff, or if the reclamation proceedings order is not itself *res adjudicata* or conclusive evidence of lack of insurable interest, defendant is liable and makes no defense.

But the affidavits filed by plaintiff, as the notice of cross-motion, the principal affidavit and the Order for Judgment show, were submitted both in opposition to the motion made by defendant and in support of plaintiff's cross-motion, plaintiff praying specifically for denial of defendant's motion (ff. 336, 354, 454; cf. *Aetna Ins. Co.* v. *Kennedy, supra*).

The Court's opinion (ff. 435-450; 43 F. Supp. 797; 126 F. [2d] 834), contrary we submit to Rules 56, 38 and 39 and the Seventh Amendment, is replete with findings of fact, painting as the surrounding facts and circumstances

the incomplete and misleading picture painted in Smith's affidavit for defendant (ff. 296-315); and conclusions incompatible with facts suppressed by defendant but proved by plaintiff are drawn as though the case did not involve such facts.

The parts taken by defendant's subordinate underwriters Thurnall and Brust, *their* understanding of the risk, their refusals and reasons for refusing to underwrite it before Smith stepped in (ff. 399-400, 403), their subsequent acts in drafting and issuing the certificates (ff. 404, 407, 408), insisting on and obtaining from the Garcia Company "lost policy" release indemnities against secretly outstanding prior insurances describing the same quantities of beans and pledged to others (ff. 394-395, 406, 408-409), as shown in plaintiff's opposing affidavits and undenied, and the failure of Thurnall and Brust to file any affidavits, are not noticed by the Court. The pretense of inspections actually made are mentioned (f. 449) as indicative of defendant's considering the risk limited; with no mention by the Court of defendant's original insistence on a special "complete inspection" to be made by outside inspectors at Garcia's expense (ff. 383, 402-403), with opposite implication, and its voluntary waiver (f. 383). Defendant's purpose to induce plaintiff to forego obtaining or demands that "non-delivery" insurances be obtained elsewhere lest defendant thereby lose the Garcia Company's business (f. 379), is ignored.

Despite defendant's admissions that it wrote for Garcia, to enable paper pledge to plaintiff, and not on any representations or inducements from plaintiff (ff. 237-238, 239; pars. 13, 14, 16), it is held factually "reasonable for defendant to believe" (f. 444) that the insurances were to be as on goods which plaintiff "owned or title to which it held" (ff. 449, 445); thereby burdening plaintiff with conditions and warranties inconsistent

with the facts, and which defendant admits were not made (f. 237).

The omnibus reclamation proceedings order made in bankruptcy proceedings of the warehouseman, collaterally pleaded by defendant, and which adjudged only that of the residue of goods in general still in the bankrupt warehouseman's possession "on the 29th day of May, 1939, the date when the above named bankrupt was duly adjudicated as such, or at any time thereafter" (f. 277), viz., five days after the non-delivery on May 24, 1939 (Comp., par. 50, ff. 71-72; undenied) none were plaintiff's, is treated as decisive (cf. *Little, et al.* v. *General Ins. Co. of America,* decided by Hulbert, *D. J.*, D. C. S. D., N. Y., May 7, 1942, holding the opposite).

Despite the fact that defendant's own "inspection" evidence showed that "the only inspections" (ff 320, 327) were made in March and April, 1939, the last more than a month previous to bankruptcy, and without any evidence whatever as to what beans were in the warehouse on May 29, 1939, affected by the order, it is treated at the outset as establishing, contrary to its terms, that plaintiff had no insurable interest in "the beans" (f. 440). The issue then is treated, not as that of what "non-delivery" itself means as risk and cause of loss in the specially added clauses, and not of whether plaintiff's undisputed "non-delivery" risk and "non-delivery" loss and valid cause of action therefor were indemnified, but as solely whether the insurances protected plaintiff "against non-delivery of goods in which it did not have any insurable interest" (ff. 441-442) or "against the fraudulent issuance of warehouse receipts" (f. 446).

The meaning of "non-delivery" under warehouse receipts and similar commercial contracts, including other forms of indemnity insurance contracts, as an admissible construction (*The G. R. Booth,* 171 U. S. 450, 459-460), is ignored.

Although ignoring throughout its opinion those "surrounding circumstances" shown by plaintiff and most eloquent of the intent of the insurances, the court states that "the question is close as to whether or not the meaning of 'non-delivery' in the light of the surrounding circumstances should be left to the jury for interpretation" (ff. 449-450), *i. e.*, even "in the light of" the incomplete and false picture painted by Smith, which the Court accepted. And the decision concludes, contrary to the evidence, that "In addition the plaintiff itself insisted upon the form used. For these reasons, the principle that the form should be construed most strongly against the insurer should be held inapplicable" (f. 450; cf. *contra, Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24, 29).

Questions Presented.

Broadly stated, the principal questions are:

First: Where in an action on negotiable "non-delivery" insurances defendant pleads as a defense, and on motion for summary judgment under Rule 56 offers as sole proof of lack of insurable interest, risk and loss, an order made in bankruptcy proceedings of the warehouseman, in omnibus reclamation proceedings therein, which merely adjudged that of the residue of goods in the warehouse on May 29, 1939, the date of the adjudication of bankruptcy (five days later than the non-delivery on May 24, 1939), and which came into the possession of the Receivers or Trustees, none were cocoa beans of which plaintiff was owner or entitled to possession (ff. 277-278), but did not purport either to pass on the "non-delivery" damage claim of plaintiff or to identify any of the beans then on hand as those described in plaintiff's receipts or insurances;

Does such order constitute either (1) *res adjudicata* or evidence conclusively rebutting or (2) any evidence whatever rebutting plaintiff's undenied *bona fide* interest, risk and actual loss by "non-delivery", or showing lack of insurable interest and loss?

SECOND: In such an action, wherein a jury trial has been duly demanded, when on contested motion by defendant and cross-motion by plaintiff for summary judgment under Rule 56 both parties file affidavits on defendant's motion, purporting to show surrounding facts and circumstances relied on to establish the intent and meaning of the insurances, and the opposing affidavits for plaintiff show a picture of surrounding facts and circumstances, negotiations, underwriting, persons taking part therein, facts known and risks apprehended by three of defendant's underwriters (two of whom gave no affidavits for defendant), precautions taken or knowingly waived by them in checking the risk and procuring indemnities in connection therewith, their motives and purpose in underwriting the risk, and the large special premiums charged therefor, which is radically different from the picture represented in defendant's papers, is inconsistent with any theory of defense asserted, strongly supports the construction of the insurances pleaded and urged by plaintiff, and shows suppression by defendant of vital facts and its best informed witnesses;

May a Federal Court, under Rules 56, 38 and 39 and the Seventh Amendment eliminate or ignore plaintiff's undenied evidence or determine the issues of fact and intent by adopting as credible and complete the picture of surrounding facts and circumstances represented in defendant's refuted affidavits, and the theory a single defendant's underwriter now professes to have entertained, and grant defendant summary judgment, denying plaintiff a trial by jury?

Under Rules 56, 38 and 39 did plaintiff's cross-moving authorize this or constitute a waiver of jury trial of the issues involved on defendant's opposed motion (*Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393-394)?

THIRD: Does not the meaning, understood by and favorable to the *bona fide* endorsee, which the word "non-delivery" has under the negotiable warehouse receipts and the law and trade usage applicable thereto, and uniformly has under similar commercial contracts such as bills of lading and the law and trade usage applicable thereto, and under indemnity insurances written in the form of indemnity bonds, constitute an admissable meaning of the word "non-delivery" in the specially added clauses of the negotiable insurances (*The G. R. Booth,* 171 U. S. 450, 459-460), which the Court cannot disregard or reject as matter of law on contested motion for summary judgment under Rule 56?

FOURTH: Is the meaning of specially added clauses of negotiable certificates of insurance, broadly insuring from date and by their own terms against "non-delivery", to be qualified, cut down or confused as to a *bona fide* endorsee by recourse to clauses of an open policy having to do with insurances such as fire, from which "non-delivery" was excluded, and which are neither reproduced nor clearly referred to in the specially added clauses of the certificates (*Phoenix Ins. Co.* v. *De Monchy* [H. L.] 45 T. L. R. 543 [C. of A.] 44 T. L. R. 364, 366, 368, 369. *Aetna Ins. Co.* v. *Willys Overland, Inc.,* 288 Fed. 912)?

FIFTH: Contrary to the evidence, the Court below held "the plaintiff itself insisted upon the form used" (f. 450). Assuming that be so, does that justify holding "inapplicable" the principle that the form used should be con-

strued most strongly against the insurer? Should not the insurances nevertheless be most strongly construed against the insurer for profit who "adopted the language" in covering the risk (*Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24, 27, 29)?

In holding that the omnibus reclamation proceedings order (ff. 272-279) adjudged that plaintiff did not own and was not entitled to possession of "the beans" and requires holding plaintiff had no insurable interest (ff. 439-440), the decision conflicts directly with such order itself (ff. 277-279); conflicts with the subsequent opposite decision by Hulbert, *D. J.*, in *Little, et al.* v. *General Ins. Co. of America, supra*, decided May 7, 1942; conflicts with *Armour* v. *Michigan Central R. R. Co.*, 65 N. Y. 111, 113, 117, 124, wherein the highest New York Court held that a replevin judgment pleaded had no effect on the enforceable right to "non-delivery" damage; conflicts with the following decisions *Ocean Accident & Guarantee Corp.* v. *Old National Bk.*, C. C. A. 6, 4 F. (2d) 753, 755; *Schreiner* v. *High Court of I. C. O. of F.*, 35 Ill App. 576; *Donohue* v. *Vosper*, 243 U. S. 59, 65; and *Russell* v. *Place*, 94 U. S. 606, 608, 610, establishing that an adjudication pleaded collaterally which did not purport to decide the questions raised by the suit in which pleaded is neither decisive of nor pertinent to such questions; conflicts with the following decisions *Thomas* v. *Taggart*, 209 U. S. 385; *In re Rose*, D. C. S. D. Tex., 39 F. (2d) 242; *In re Kaplan* v. *Myers*, C. C. A. 3, 241 F. 459; *Korns* v. *Thomson & McKinnon*, D. C., D. Minn., 3rd Div. 22 F. Supp. 442, app. dism'd C. C. A. 8, 102 F. (2d) 993; *Rankin* v. *Tygard*, C. C. A. 8, 198 F. 795, and cases cited; and *Poswick* v. *Cutten*, 258 N. Y. App. Div. 218, aff'd 283 N. Y. 660, establishing that claims in reclamation proceedings and orders made thereon are different, arising under different sections of the Bankruptcy Laws, from

proofs of claims (such as one by this plaintiff for "non-delivery" damage) for debts or liabilities, and neither adjudicate nor bar the latter nor the claimant's indemnity rights against third parties when collaterally pleaded; conflicts with *Richardson* v. *City of Boston,* 19 How. (60 U. S.) 263, 270 and *McNamee* v. *Hunt,* C. C. A. 4, 87 F. 298, 301, establishing that application of descriptive provisions of written instruments "to external objects described therein is the peculiar province of the jury"; and conflicts with the meaning of "non-delivery" risk, as the subject of special insurance.

The decision, assertedly based on surrounding facts and circumstances, conflicts with *Compania de Navegacion* v. *Firemens Fund Ins. Co.,* 277 U. S. 66, 68-81, in that special circumstances here of principal significance, under the *Compania* decision, are those shown in plaintiff's opposing affidavits which the Court ignored.

Petitioner had duly demanded a trial by jury (f. 10) and it did not waive by its cross-motion its right in opposing defendant's motion to a jury trial on all the issues if petitioner's cross-motion were denied (*Aetna Ins. Co.* v. *Kennedy, supra*). On defendant's motion, petitioner as the "opposing party" was entitled to have *its* evidence treated as proving all that *it* reasonably may be found sufficient to establish, and to have drawn in *its favor* all inferences fairly deducible therefrom (*Gunning* v. *Cooley,* 281 U. S. 90, 94); to have "all countervailing evidence" disregarded (*E. K. Wood Lumber Co.* v. *Andersen,* C. C. A. 9, 81 F. [2d] 161, 166, cert. den. 297 U. S. 723); and to have issues that depend on the credibility of witnesses, and the effect or weight of evidence decided by a jury (*Gunning* v. *Cooley, supra*). Smith, whose misleading assertions were adopted by the Court as established and as complete, was an interested witness whose testimony, even had it remained unrefuted, "should

have been submitted to the jury" (*Brooks* v. *People's Bank,* 233 N. Y. 87, 94). The silence of himself, Brust and Thurnall on facts which plaintiff's affidavits showed Smith had misrepresented or suppressed, was itself "evidence of the most convincing character" (*Interstate Circuit* v. *U. S.,* 306 U. S. 208, 226) for plaintiff. The Court had no right to substitute itself for the jury, pass upon the effect of the evidence, find (or eliminate by ignoring) the facts involved in the issue and render judgment thereon; but "That is what was done in the present case" (*Baylis* v. *Travellers Ins. Co.,* 113 U. S. 316, 320-321). This conflicts with the foregoing decisions and is contrary to Rules 56, 38 and 39 and the Seventh Amendment.

In determining intent, purpose and meaning as now claimed by defendant it conflicts with the following decisions establishing the rule applicable "particularly to insurance cases" (*Union Trust Co.* v. *Whiton,* 97 N. Y. 172, 173) that the questions of intent, purpose and meaning of particular words in a written instrument are questions of fact for the jury. *Wood* v. *Guarantee Trust & Safe Deposit Co.,* 128 U. S. 416, 424; *Pitney* v. *Glens Falls Ins. Co.,* 65 N. Y. 6, 17; *U. S. Rubber Co.* v. *Silverstein,* 222 N. Y. 168, 171; *Utica City Nat. Bank* v. *Gunn,* 229 N. Y. 204, 208; *Kavanaugh* v. *Kavanaugh Knitting Mills,* 226 N. Y. 185, 198; *Piedmont Hotel* v. *Nettleton Co.,* 263 N. Y. 25, reversing a summary judgment; *Rosenkranz* v. *Schreiber Brewing Co.,* 287 N. Y. 322, 325; *Rey* v. *Simpson,* 22 How. (63 U. S.) 341, 347.

In failing to give effect to evidence that the specially added clauses agreeing "also to insure" against "non-delivery" caused and were designed to cause plaintiff to rest satisfied the risk was fully covered and to forego insuring it elsewhere, as it clearly could have done (*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493), defendant fearing that otherwise

it might "lose the business" (ff. 378-379), the decision conflicts with the following decisions establishing that one may not so entrap or mislead another and then avoid liability; *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678; *Voorhis* v. *Olmstead*, 66 N. Y. 113, 117, 118; *Conrow* v. *Little*, 115 N. Y. 387; *Skinner* v. *Norman*, 165 N. Y. 565, 571; *Reynolds* v. *Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320, 324; *Wolfe* v. *Security Fire Ins. Co.*, 39 N. Y. 49, 51; *Pratt* v. *N. Y. Central Ins. Co.*, 55 N. Y. 505, 512; *Rice Oil Co.* v. *Atlas Assur. Co.*, C. C. A. 9, 102 Fed. (2d) 561, 576; and that defendant's duty was enlarged by knowledge that endorsement of the insurances to plaintiff for its reliance was the specifically intended "prospective use" (*Glanzer* v. *Shepard*, 233 N. Y. 236, 240) thereof, and the "end and aim of the transaction" (*Id.* 233 N. Y. 238-239; *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 181, 182).

In so far as the decision is based on findings as to what defendant did not know or was not informed, and as to the limited nature of inspections defendant says it actually made, and ignores its initial demand for "complete" inspection, and its later assuming to make such inspection as it deemed necessary, it conflicts with *Supreme Lodge K. P.* v. *Kalinski*, 163 U. S. 289, 298; *Fidelity & Deposit Co.* v. *Queens Co. Trust Co.*, 226 N. Y. 225, 233; *Columbian Nat. Life Ins. Co.* v. *Rodgers*, C. C. A. 10, 116 Fed. (2d) 705, 707, cert. den. 313 U. S. 561; and with *Rochester & C. T. R. Co.* v. *Paviour*, 164 N. Y. 281, 284-285 and *Soma v. Handrulis*, 277 N. Y. 223, 233-234.

Assuming that as held below (fol. 445) contrary to ample evidence defendant "did not know of the issuance" or "negotiation to plaintiff" of the warehouse receipts, the decision conflicts with *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 461; *Western N. Y. Life Ins. Co.* v. *Clinton*,

66 N. Y. 326; *Keyes* v. *Anderson*, C. C. A. 8, 262 F. 748; and *O'Brien* v. *North River Ins. Co.*, C. C. A. 4, 212 F. 102, 105, in holding that this, or the lack of specific enumeration of them in the insurances, is ground for giving the coverage a more narrow rather than a broader meaning. In determining such issue by accepting Smith's limited assertions, without a trial to enable "full examination" of him, Brust and Thurnall, "who could have given further testimony on the subject," it conflicts with *Stewart* v. *Southern Ry. Co.*, No. 161, Feb. 16, 1942, 86 L. ed. 548, 550.

Its ignoring defendant's suppression of facts and witnesses conflicts with *Equitable Life Ins. Co.* v. *Halsey Stuart & Co.*, 312 U. S. 410, 426; *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Interstate Circuit* v. *U. S.*, 306 U. S. 208, 226.

In so far as the decision holds that the certificates in covering "non-delivery" were endorsements to an open policy covering goods, and this made it reasonable for *defendant* to believe they were conditioned accordingly, it conflicts with the express provisions of the certificates which do not certify endorsements of "non-delivery" insurance to the policy, but themselves specially agree "also to insure" from their own date against "non-delivery"; and conflicts with *Phoenix Ins. Co.* v. *De Monchy* (H. L.) 45 T. L. R. 543 (C. of A.) 44 T. L. R. 364, 366, 368, 369; *Aetna Ins. Co.* v. *Willys Overland, Inc.*, N. D. Ohio, 288 Fed. 912, and *Imperial Shale Brick Co.* v. *Jewett*, 169 N. Y. 143, establishing the independence of the certificate insurances; with *Eddy* v. *Farmers Mutual Ins. Co.*, 20 N. Y. App. Div. 109, establishing that special insurances are not affected by other clauses; with *Aldrich* v. *N. Y. Life Ins. Co.*, 235 N. Y. 214, 224, and *Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320, establishing that an apparent meaning of a clause will be binding

though at variance with an obscurely expressed real meaning intended by the insurer; with the following decisions establishing that the character or meaning of a particular insurance is to be determined by the nature of the contract it expresses according to the facts in evidence and regardless of the nomenclature of a policy or the character or avowed purposes of the company that issued it (*Knott* v. *Security Mutual Life Ins. Co.*, 161 Mo. App. 579, 144 S. W. 178; *Oceanic Steam Navigation Co., Ltd.* v. *Evans*, 40 Comm. Cas. 108, revg. 50 L. T. R. 256; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 F. (2d) 493; *O'Brien* v. *North River Ins. Co.*, C. C. A. 4, 212 Fed. 102, 105, 106; *Bidwell* v. *Northwestern Ins. Co.*, 24 N. Y. 302); and with *Bekins* v. *Lindsay-Strathmore Irr. Dist.*, C. C. A. 9, 114 Fed. (2d) 680, 684, cert. den. 312 U. S. 693, rehearing denied 312 U. S. 716, establishing that not the "label" but "all of the acts, statements and writings" shown by "the entire record" determine contractual intent.

Assuming that defendant was an innocent insurer, deceived by the Garcia Company and its controlled warehouse, the decision conflicts with *General Interest Ins. Co.* v. *Ruggles*, 12 Wheat. (25 U. S.) 408, 410-414; *Ryan* v. *U. S.*, 19 Wall. (86 U. S.) 514; *Comptoir Nationale d'Escompte de Paris* v. *The Law Car & General*, reported in Macgillivray on Insurance Law, 2nd Ed. 504; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 Fed. (2d) 493; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *McWilliams* v. *Mason*, 31 N. Y. 294; and *Rothschild* v. *Frank*, 14 N. Y. App. Div. 399, in not applying the principle that of two innocent parties it was defendant's duty to protect itself without relying on plaintiff, and plaintiff's right to rely on the insurances unqualified by fraudulent acts of the Garcia Company or its warehouse company.

In its determination of the meaning of "non-delivery" in the insurances the decision conflicts with the following decisions defining equivalent terms in bills of lading, *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, 195; *Davis* v. *Roper Lumber Co.,* 269 U. S. 158, 161; *M. & T. Trust Co.* v. *Export S. S. Corp.,* 262 N. Y. 92, 98; cert. den. 290 U. S. 650; with *The Falcon,* 3 Blachf. 64 and *Roberts* v. *Chittenden,* 88 N. Y. 33; and with the following decisions establishing that plaintiff sustained loss by "non-delivery", for which in New York the warehouseman is liable in an action for damage by "non-delivery" (*Armour* v. *Michigan Central R. R. Co.,* 65 N. Y. 111; *Hanover National Bk.* v. *American Dock & Trust Co.,* 148 N. Y. 612; *Rosenberg* v. *P. Viane, Inc.,* 109 Misc. 215 on "non-delivery" interpleader, and double judgment rendered therein, *sub nom. Joseph* v. *P. Viane, Inc.,* 118 Misc. 344, affd. 206 App. Div. 698); for which a bonded warehouseman and his bondsman alike are liable for "non-delivery" damage (*Maryland Casualty Co.* v. *Washington Loan and Banking Co.,* 167 Ga. 354); for which a surety on a "delivery" bond is liable (*Ryan* v. *U. S.,* 19 Wall. [86 U. S.] 514); and for which an indemnity insurer is liable under a contract indemnifying against damages for "lack of delivery" (*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493); and conflicts with *The G. R. Booth,* 171 U. S. 450, 459-460, in failing to apply such meanings.

In giving to the term used a more narrow rather than a broader special meaning in the insurances than it has under the warehousing or carrier relationships, the decision conflicts with *Aschenbrenner* v. *U. S. F. & G. Co.,* 292 U. S. 80.

The following are the few prior decisions found involving insurance contracts—all non-negotiable—covering "delivery", "lack of delivery" or similar risks. *Ryan*

v. *U. S.* (1873) 19 Wall. [86 U. S.] 514; *Comptoir Nationale d'Escompte de Paris* v. *The Law Car & General* (1908) K. B. (1909) C. A., reported only as we find in Macgillivray on Insurance Law, 2nd Ed., 504, *et seq.; Maine Lumber Co.* v. *Maryland Casualty Co.* (1926) 216 App. Div. 35, affd. 244 N. Y. 537; *National Bank of Tacoma* v. *Aetna Casualty & Surety Co.* (1931) 161 Wash. 239; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma* (1932) C. C. A. 9, 59 F. (2d) 493; *Luikart* v. *Mass. Bonding & Ins. Co.* (1935) 129 Neb. 771, 263 N. W. 124. All hold the insurer liable where a risk existed under and there was violation of a delivery obligation fixed by law or contract; and the decision below conflicts therewith and with *The G. R. Booth, supra,* in failing to apply such meaning.

The date sequence of such decisions illustrate the recent development of "lack of delivery" or "non-delivery" indemnity insurances; and in *Winter on Marine Insurance,* by defendant's president, the first edition (1919) did not discuss "non-delivery" insurance, whereas the second edition (1929) discusses it as a form developed since the World War.

Petitioner further contends that such negotiable insurances specially agreeing "also to insure" from date against "non-delivery" for protection of an endorsee and under circumstances such as shown by plaintiff's papers, are not insurances of bailed physical property, like the earlier fire insurances, requiring and subject to condition or warranty of existence of, and an insurable interest of the endorsee in bailed physical property, as such; but are insurances of what defendant's president WINTER himself has called the endorsee's "insurable risk" and "insurable hazard" of a "liability-loss" by non-delivery in which such "specially enumerated" risk constitutes one of the "true liabilities of the carriers [or warehouse-

man] for which they are liable under their bill of lading" [or warehouse receipts]; and cover any "non-delivery" liability of such a bailee-contractor imposed by law or fixed by contract (*Winter on Marine Insurance,* 2d Ed., 170-171, 113, 129; bracketed words ours). They afford protection to the endorsee, additional to that of the bailee-contractor's own engagement, which the endorsee's *risk* itself fully entitles him to obtain and enforce (*Great Lakes Transit Corp.* v. *Interstate Steamship Co.,* 301 U. S. 646, 652, 653). The decision conflicts therewith; and the questions on which this Court has not yet passed, as to the rights of an "order" merchant, banker, consignee or pledgee, under these negotiable "non-delivery"—or, as WINTER puts it, "*liability* loss"—insurances, we submit, closely parallel in nature and importance those reviewed, and the rulings thereon in this case below closely parallel those reversed, in *Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra,* wherein this Court granted certiorari "In view of the importance of the issue" (301 U. S. 648).

Its ruling that plaintiff had no insurable risk and interest also conflicts with the following decisions establishing that "No legal obstacle prevents parties, if they so desire" from insuring against loss even though, unknown to the parties, the risk and the loss covered may already have occurred (*U. S.* v. *Patryas,* 303 U. S. 341, 345; *General Interest Ins. Co.* v. *Ruggles,* 12 Wheat. [25 U. S.] 408, 418), that "whatever act, event or property, bears such relation to the person seeking insurance, as that it can be said, with a reasonable degree of probability, to have a bearing upon his prospective pecuniary condition" may be insured (*Rohrback* v. *Germania Fire Ins. Co.,* 62 N. Y. 47, 53-54), and that any *bona fide* risk supports insurance thereof *Lucena* v. *Crawford,* 2 Bos. & Pul. 75, 7 Term. 13; *Hooper* v. *Robinson,* 98 U. S. 528, 538; *General Interest*

Ins. Co. v. *Ruggles, supra; Hancox* v. *Fishing Insurance Co.*, 3 Sumn. 132; *Insurance Co.* v. *Thompson*, 95 U. S. 547, 549-550; *Harrison* v. *Fortlage*, 161 U. S. 57, 65; *Filley* v. *Pope*, 115 U. S. 213, 220; *Empire Development Co.* v. *Title G. & Tr. Co.*, 225 N. Y. 53, 58-59; *National Filtering Oil Co.* v. *Citizens Ins. Co.*, 106 N. Y. 535; *Cone* v. *Niagara Fire Ins. Co.*, 60 N. Y. 619, 621; *Waters* v. *Merchants Louisville Ins. Co.*, 11 Pet. (36 U. S.) 213, 221; *Inglis* v. *Stock* (1885) 10 A. C. 263, and *Stock* v. *Inglis* (1884) 12 Q. B. 564; *Thompson* v. *Taylor*, 6 Term. 478; *Stirling* v. *Vaughan*, 11 East. 529; and conflicts with *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 44, establishing that "the protean basis" of any such rule never prevents enforcement of a contract where no publicly injurious results can follow its enforcement.

In confusing "non-delivery" indemnity insurances of this character with guaranty or suretyship, treating plaintiff's contention as involving guaranty, and treating the issue as involving choice between guaranty or suretyship and property insurance of beans, the decision conflicts with *Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra*, 301 U. S. 646, 652; and with *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma, supra; National Bank of Tacoma* v. *Aetna Casualty & Surety Co.*, 161 Wash. 239, 244; *First National Bank* v. *National Surety Co.*, 228 N. Y. 469; *Assets Realization Co.* v. *Roth*, 226 N. Y. 370; *Maine Lumber Co.* v. *Maryland Casualty Co.*, 216 N. Y. App. Div. 35, affd. 244 N. Y. 537; and *Moore* v. *Capital Nat. Bank of Lansing*, 274 Mich. 56.

In ignoring or going back of "non-delivery" to the "reason" (f. 261) alleged but unproved by defendant and purportedly found (without evidence) by the Court (f. 446), the decision conflicts with *Ins. Co.* v. *Transportation Co.*, 12 Wall. [79 U. S.] 194, 199; and *Bird* v. *St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, 53, 55, establishing

that especially in insurance the *causa proxima* alone, and not the antecedent cause of that cause or *causa causans,* is to be considered; with *Baldwin* v. *Childs,* 249 N. Y. 212, 215, establishing that even were defendant's allegation proved, plaintiff had enforceable delivery rights, obligating both the Garcia Company and the warehouseman "to feed" such rights; with the "lost policy" release evidence showing defendant apprehended precisely such obligation as the particular risk existing; and with *Ryan* v. *U. S., supra,* 19 Wall. (86 U. S.) 514, and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma, supra,* C. C. A. 9, 59 F. (2d) 493, showing that non-delivery default is itself the risk, condition and event occasioning liability without differentiation even on proof of a third party's fraud.

Both lower courts state that "the queston is close" (ff. 449-450). This Court at the present term, in reversing a judgment directed for a defendant, in *Jacob* v. *City of New York,* No. 589, decided March 30, 1942, held that even where "Without doubt the case is close and a jury might find either way," such "is no reason for a Court to usurp the function of the jury" (*Cf. Baylis* v. *Travellers Ins. Co., supra,* 113 U. S. 316, 320-321). The decision below conflicts therewith. Here the question was made assertedly "close" by the Court considering only the picture painted in defendant's affidavits; misconstruing the omnibus reclamation proceedings order; making findings favorable to defendant on conflicting evidence or without evidence to support them; ignoring plaintiff's evidence; ignoring plaintiff's undisputed "non-delivery" risk and loss, and the established meaning of "non-delivery" under warehouse receipts, bills of lading, other indemnity insurances and other commercial contracts; and refusing "In addition" (f. 450), in direct conflict with *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24, 29, to

apply the principle that the language used should be construed most strongly against the insurer.

Reasons for Granting the Writ.

As hereinabove indicated, the Circuit Court has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on similar matters; it has decided important questions of local New York law and rights thereunder probably in conflict with applicable local decisions; it has decided important questions of Federal law and practice which have not been, but should be, settled by this Court, and has decided them in a way probably in conflict with applicable decisions of this Court, and in conflict with Rules 56, 38 and 39 of the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution; it has decided important questions of commercial and insurance law, of novelty and public importance, and of probable world wide importance, in a way probably in conflict with State and National policy, and with applicable decisions of this Court and of other Federal, State and English Courts; and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The importance of the questions lies, not only in the importance of establishing the proper construction and meaning of novel and special negotiable "non-delivery" insurances now widely in use by indemnity insurers such as defendant, the proper means and method of proving and determining the construction and meaning thereof, and the proper applicability thereto of the meaning, understood by and favorable to a *bona fide* endorsee

thereof, which the word "non-delivery" has by trade usage and under warehouse receipts and other forms of commercial contracts, under other forms of similar indemnity insurances, and under Federal and local New York court decisions, and whether such meaning is fixed or relative and determinable in each case from the peculiar surrounding facts and circumstances; and not only in the importance of establishing the proper construction and effect when collaterally pleaded of omnibus reclamation proceedings orders in bankruptcy; but also, and especially, in the circumstance that the lower courts have assumed power under Rule 56 to determine disputed factual issues herein both as to the surrounding facts and circumstances and as to the intent, purpose and meaning of particular words used in written contracts of insurance, and to ignore issues and evidence in connection therewith, contrary to Rules 56, 38 and 39, the Seventh Amendment and previous decisions of this Court and other Courts.

The decision, if allowed to stand, must have far reaching importance as a precedent, and will create great confusion in the commercial and insurance worlds, in matters of bankruptcy and *res adjudicata,* and in Federal trial and summary judgment procedure and the administration of justice. It will enable any Federal Court, despite the fact that a jury trial has been demanded, to take the issues away from the jury and decide the case itself, whenever a motion for summary judgment is made and opposed under Rule 56, without regard to how opposite the factual picture appears in the opposing affidavits or how completely these refute the moving party's claims, show its suppression of facts, records and best informed witnesses and establish the opposing party's case. And it will reverse the rules heretofore obtaining for construing insurance contracts of insurers for profit

most strongly in favor of a *bona fide* insured and against the insurer.

Respectfully submitted,

NIESCHLAG & CO., INC.,

By PAUL W. KOCHER, Treas.,
Petitioner.

Dated, New York, June 3, 1942.

We hereby certify that we are counsel for petitioner in the above matter in this Court; that we each have examined the foregoing petition and in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for purpose of delay.

HAROLD T. EDWARDS,
CHARLES A. ELLIS.